Supreme Court, U.S.
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No. 01-1710

IN THE

Supreme Court of the United States

EMPIRE HEALTHCHOICE, INC.,

Petitioner,

v.

JOHN F. BYRNES, *et al.*,

Respondents,

-and-

IRMA M. ALICEA, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION FOR THE ABBRUSCATO RESPONDENTS

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Can an ERISA[1] plaintiff claiming a welfare benefit be allowed to present his/her case to a trier of fact if the employer has made statements in Summary Plan Descriptions ("SPDs") and otherwise, which will support a valid contract claim by the plaintiff under established contract law?

2. Can an employer deny a plaintiff a previously promised welfare benefit by distributing a reservation of rights ("ROR") after the employee has begun his/her employment and has met the employer's retirement standards required for the benefit as enunciated prior to the later reservation of rights?

3. Does an employer's actions in making repeated communications with employees promising a lifetime welfare benefit, but failing to state that such benefit could be reduced at any time, constitute a breach of the employer's ERISA fiduciary duties?

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1. The Employee Retirement Income Security Act, 29 U.S.C. § 1001, *et seq*. will be referred to herein as "ERISA."

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Other Authority:

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STATEMENT OF THE CASE

This case involves a group of retired employees of Petitioner, Empire Blue Cross and Blue Shield ("Empire") who had been continuously promised in writing by Empire lifetime life insurance with a death benefit approximately equal to their annual salary at retirement (the "Life Insurance Benefit") throughout their period of employment. Following their retirement (pursuant to Empire's normal retirement plan), Empire unilaterally reduced the benefit to $7500, relying upon an ERISA Summary Plan Description ("SPD") issued in 1987. A second group of plaintiffs retired pursuant to early retirement plans offered by Empire which plans also featured the Life Insurance Benefit as an incentive to accepting the early retirement plan. Empire also attempted to reduce this benefit to $7500 after the offerees of the early retirement program accepted the offer and retired early. These early retirees based their claim on breach of contract, promissory estoppel or breach of fiduciary duty. It does not appear as if the decision of the Second Circuit with respect to the early retirees (other than with respect to breach of fiduciary duty claim) is the subject of Empire's petition (this Court has denied certiorari in the case of *Schonholz v. Long Island Jewish Medical Center*, 87 F.3d 72 (2d Cir. 1996), *cert. denied*, 519 U.S. 1008 (1996), which is the case upon which the Second Circuit based its decision as to the early retirees).

The facts of the case are well and accurately stated in the opinions of the Second Circuit in *Devlin et al. v. Empire Blue Cross and Blue Shield*, 274 F.3d 76 (2d Cir. 2001) and *Abbruscato et al. v. Empire Blue Cross and Blue Shield*, 274 F.3d 90 (2d Cir. 2001), which are attached to Empire's Petition.

The Second Circuit found that Empire had engaged in a course of conduct, which could be found by a trier of fact to have been an enforceable promise made by Empire to plaintiffs for the Life Insurance Benefit, which benefit could not be unilaterally revoked or decreased by Empire.

The Second Circuit also held that a trier of fact could find that Empire's course of conduct over the years with respect to Plaintiffs could be found to be a breach of Empire's fiduciary duties under the terms of ERISA.

Empire requested a rehearing *en banc* by the Second Circuit, which was rejected (not one judge of the Second Circuit having requested an *en banc* hearing).

EMPIRE'S PETITION SHOULD BE DENIED AS IT DOES NOT MEET THE REQUIREMENTS OF THIS COURT'S RULES 10(a) & 10(c)

I

The Standard to be Met by an ERISA Welfare Benefit Claimant in Order to Reach a Trier of Fact

Empire's first requested ground for grant of its petition is an alleged conflict among the Circuits with respect to setting the standard to be used by District Courts in allowing an ERISA Welfare Benefit Plaintiff to overcome a defendant's motion for summary judgment in order to reach a trier of fact on the facts as alleged (Since ERISA cases do not allow for jury trials, the trier of facts in these cases is a Federal District Court Judge). This is a very limited issue with respect to allowing a trial on the facts and issues. The Second Circuit is not misapplying or misinterpreting the established law for

the determination of ERISA welfare claims. The Second Circuit's approach is more in line with the statute as stated at (29 U.S.C § 1001, emphasis added):

> — It is hereby declared to be the policy of this Act *to protect* interstate commerce and *the interests of participants in employee benefit plans and their beneficiaries*, by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto, *by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts.*

The Second Circuit's approach provides for a more careful and reasoned consideration of the facts and circumstances involved in each particular case rather than permitting plaintiffs, who may well have a good case, from being "cut off at the pass" merely because of the absence of some particular term of art language. The Second Circuit is setting a procedure pursuant to which all of the facts relevant to the claim, as to whether or not the employer, through its acts, course of conduct and communications has made an enforceable contract with the employee can appropriately be examined[2]. Any difference between the Circuits on this issue arises from differing factual situations in each of the cases

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2. Empire's concern over the effect that the Second Circuit's approach will have on the "realities and expenses of modern civil litigation" (petition at p. 18) is misplaced. It is almost axiomatic that the plaintiffs in these cases are retirees of modest means without the resources to incur the legal representation expenses availed of by employers to resist claims.

involved. For example in *Wise v. El Paso Natural Gas Co.*, 986 F.2d 929 (5th Cir. 1993) (which is heavily relied upon by Empire) there was a factual difference in that the employer had announced *in advance* the actual reduction of employee benefits and provided the affected employees a window of opportunity during which they could retire and avoid losing the benefits. Differences between decisions of the Circuits if they can be accounted for by differences in facts are not a ground for granting certiorari. As stated by Justice Harlan in the 18th Annual Benjamin Cardozo Lecture delivered before the Association of the Bar of the City of New York on October 28, 1958, "Moreover, differences between the Courts of Appeals in two or more Circuits will not be accepted as a conflict if they can fairly be accounted for on the basis of variations in the factual situations among the cases involved" (Harlan, *Manning the Dikes*, 13 Record of NYC Bar Assn. 541, 552 (1958). Although *Wise* may simplify the court's dockets it fails to carry our the purpose of ERISA as it established an almost insurmountable barrier for employees with meritorious cases and allows for employers to engage in crafty behavior by making extensive promises to employees so long as the employer is careful not say the magic words dictated by *Wise*. *Wise* prevents the Court from conducting an adequate evaluation of the evidence to properly determine the claim. The Second Circuits approach allows for the court to determine the true intent of the parties. *See International Union, United Automobile, Aerospace & Agricultural Implement Workers of America (UAW) International Union et al. v. Yard – Man, Inc.*, 716 F.2d 1476 (6th Cir. 1983), *cert. den.*, 465 U.S. 1007 (1984).

The so-called "conflict" between the Circuits alleged by Empire is really (i) a matter of how the different circuits want to manage their trial dockets — whether or not to allow

ERISA cases to proceed beyond summary judgment to trial or (ii) a difference in the underlying facts of the cases involved.

The difference between the Circuits on this issue will not lead to trial forum shopping as alleged by Petitioner. Plaintiffs in these situations will still be bound by and will have to satisfy the venue and jurisdictional requirements of the Federal Courts. The Second Circuit's approach will not as Empire states open up employers to an onslaught of employee claims. The simple answer to that unjustified fear is — don't make promises you don't intend to keep.

II

The Issue of Pre-Retirement Vesting

Although welfare benefits are not vested under ERISA, all courts agree that employers are free to make contractual arrangements with employees to make the receipt of such benefits enforceable[3]. In interpreting and enforcing such contracts Congress intended in ERISA that the Federal courts would be guided by and would look to the general established principals of contract law. *In re White Farms Co.*, 788 F.2d 1186, 1191, (6th Cir. 1986). That is exactly what the Second Circuit did in *Devlin*. It looked at the record and came to the conclusion, based on established principals of contract law and after examining the intent of the parties, that Empire in

3. It should be noted that the Welfare Benefit we are here dealing with is life insurance, the future costs of which are readily and accurately obtainable from actuarial tables *and not* health insurance which is susceptible to future variations and increases in costs. Empire's treatment of this issue is limited to the discussion of the cost vagaries of health insurance.

its pre-1987 dealings with the retirees obligated itself contractually to provide the lifetime Life Insurance Benefit, and could not relieve itself of that obligation by means of the after the fact 1987 ROR. Likewise, in *Abbruscato*, the Second Circuit found that Empire had promised an unqualified lifetime Life Insurance Benefit to the early retirees, which was to be enforced. The cases cited by Empire in support of its position, *Maurer v. Joy Techs., Inc.*, 212 F.3d 907 (6th Cir. 2000) and *Houghton v. Sipco, Inc.*, 38 F.3d 953 (8th Cir. 1994) present differences in facts, not law. In both cases there was no *lifetime benefits* language as was found to be present in the Empire documents given to its retirees. In *Sipco*, the retirees were warned of the *actual* reduction of benefits before they retired and they did not meet the pre-established retirement standards. In *Houghton* the Court stated the benefits could be amended *absent contractual arrangements to the contrary.* (*Houghton* at p. 957). Empire, in this case made contractual arrangement to the contrary. In *Maurer* the benefits arose under and terminated pursuant to collective bargaining agreements. Thus, on closer examination there is no conflict between the Circuits on this issue as the cases are differentiated on the basis of differences in facts.

III

The Second Circuit's Decision on the Fiduciary Issue Followed the Principals as Established by this Court

Empire's argument with respect to the breach of fiduciary claims are best dealt with by examining the following language of this Court set forth at the beginning of its decision in *Varity Corp. v. Howe*, 516 U.S. 489, 1996 where it stated:

> In conducting our review, we do not question the lower courts' findings of serious deception by the employer, but instead consider three legal questions. First, in the factual circumstances (as determined by the lower courts), was the employer acting in its capacity as an ERISA "fiduciary" when it significantly and deliberately misled the beneficiaries? Second, in misleading the beneficiaries, did the employer violate the fiduciary obligations that ERISA § 404 imposes upon plan administrators? Third, does ERISA § 502 (a) (3) authorize ERISA beneficiaries to bring a lawsuit, such as this one, that seeks relief for individual beneficiaries harmed by an administrator's breach of fiduciary obligations? We answer each of these questions in the beneficiaries' favor, and we therefore affirm the judgment of the Court of Appeals.

Those same three legal questions were examined and answered affirmatively by the Second Circuit in *Devlin* and *Abbruscato.*

In reaching its decision as to the breach of fiduciary obligation claim the Second Circuit carefully examined the facts involved in *Devlin* and *Abbruscato* and applied the established ERISA law, particularly the holding of *Variety.* The Second Circuit stated:

> "In repeatedly describing its life insurance benefit as remaining constant for life, Empire may have violated this duty to deal honestly with the plan beneficiaries. Even if, on remand, the trier of fact determines that there was no promise to vest the

> life insurance benefits, Empire may have still violated any fiduciary duties in its retiree letters and other communications which promised lifetime benefits but failed to note that Empire could reduce or terminate these benefits at time" (*Devlin* at p. 88).

That statement is a clear and concise expression of an employer's fiduciary obligations under ERISA and applies the precepts of *Varity* to the *facts* of the case at hand.

Interestingly enough, most of the cases cited by Empire in support of its conflicts among the circuits argument, are cases that pre-date *Varity* and its interpretation of the fiduciary duty provisions of ERISA. The cases cited in support of the alleged differences between the Circuits are distinguished on the facts. In *La Rocca v. Borden, Inc.*, 276 F.3d 22 (1st Cir. 2002) cited by Empire, the plaintiffs had received re-instatement of the benefit plan and were attempting to rely on a breach of fiduciary claim to recover something over and above the contractually defined benefits. *Tolson v. Avondale Industries Inc.*, 141 F.3d 604 (5th Cir. 1998) was a case in which a plaintiff, who was challenging the denial of coverage for a mental condition under a company health insurance plan, made a heroic attempt to invoke relief under a breach of fiduciary obligation theory. The court characterized the plaintiff's claim as a "self-proclaimed *res nova* argument . . . more correctly seen as specious sophistry, approaching frivolousness." That is certainly not the case here, as shown by the Second Circuit's endorsement of the validity of these plaintiffs' claims and can not serve as grounds for granting Empire's petition.

Finally, Varity following ERISA, holds that the Courts are to provide a deserving ERISA claimant with equitable relief where relief is not otherwise available. That carries out the true intent of the statute not withstanding hypertechnical and convoluted arguments of Empire to the contrary.

CONCLUSION

These two cases are garden variety claims for enforcement of a contract (and were treated as such by the Second Circuit) which Empire has blown out of proportion in order to enlist this Court's aid in its unrelenting efforts to use every legal device at its disposal to avoid its obligations. This Court should not allow itself to be used to further these efforts. Accordingly, Empire's Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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